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Supreme Court of the United States

October Term, 1978

No. 78-1422

RETIREMENT FUND TRUST OF THE PLUMBING, HEATING AND PIPING INDUSTRY OF SOUTHERN CALIFORNIA,

Appellant,

vs.

EDITH J. JOHNS,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

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Appellant,

vs.

EDITH J. JOHNS,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

Appellant appeals from a decision of the Court of Appeal, Fourth Appellate District, Division One, of the State of California in the above entitled case. Appellant's timely Petition for Hearing to the California Supreme Court to contest said decision was denied.

Opinion Below.

The opinion of the Court of Appeal, Fourth Appellate District, of the State of California is reported at 85 Cal.App.3d 511, 149 Cal.Rptr. 551 (1978) and is set forth in Appendix B, *infra* pp. 11-12. The minute order of the California Supreme Court denying Appellant's Petition for Hearing is included in Appendix C, *infra* p. 13.

Jurisdiction.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of California's community property laws, specifically Cal. Civ. Code §§5105 and 5125, on the ground that they are repugnant to the laws and Constitution of the United States.

On September 2, 1976 the Honorable Charles W. Froelich, Judge of the Superior Court of the State of California for the County of San Diego, entered an order requiring Appellant to make direct payments to Respondent of one-half (½) of her former husband's periodic retirement benefits under Appellant's "plan", pursuant to California's community property laws. In so doing, Judge Froelich rejected Appellant's contention that said order was unconstitutional as in violation of the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2), because Congress intended the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), Pub. L. No. 93-406, 29 U.S.C. §1001, *et seq.*, and section 302(c)(5) of the National Labor Relations Act (hereinafter "NLRA"), as amended, 29 U.S.C. §186(c)(5), to preempt state laws regarding the division of property in dissolution proceedings to the extent they affect or relate to the operation or management of employee pension funds.

On November 3, 1976, Appellant filed a timely appeal from the aforementioned order in the Court of Appeal for the Fourth Appellate District of the State of California. Subsequently, briefs were filed by Respondent's and Appellant's respective counsel on the issue of the preemptive effect of ERISA and the

NLRA *vis-a-vis* California's community property laws. Both parties waived oral argument. On October 13, 1978, the Court of Appeal entered an abbreviated decision affirming the order of the Superior Court below.

In its brief opinion, the Court of Appeal held that ERISA "does not preempt California law as is applied here in matrimonial matters." Appendix B, *infra* pp. 11-12. Its rejection of Appellant's secondary argument that Section 302(c)(5) of the NLRA preempts California's community property laws in this context must be inferred from its decision to affirm the order below. The court did not, however, expressly address this issue in its opinion.

On November 21, 1978, Appellant filed a timely Petition for Hearing before the California Supreme Court to contest this decision. On December 20, 1978, the California Supreme Court denied Appellant's petition. Timely notice of appeal to this Court was filed on March 2, 1979.

As the denial of Appellant's Petition for Hearing by the California Supreme Court has the effect of upholding the validity of Cal. Civ. Code §§5105 and 5125 as against Appellant's challenge, this matter is appropriately brought by appeal. *See, e.g., Reconstruction Finance Corp. v. County of Beaver Pennsylvania,* 328 U.S. 204 (1946).

In the event that the Court does not consider appeal the proper mode of review, appellant respectfully requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§1257(3) and 2103.

Constitutional and Statutory Provisions Involved.

This case involves Article VI, Clause 2 of the United States Constitution. The United States statutes involved are Section 302(c)(5) and (d) of the National Labor Relations Act, as amended, 29 U.S.C. §186 (c)(5) and (d), and Sections 3, 203(a), 205, 206(d)(1), 404(a)(1), 409(a), 514(a) and (c), and 1021 (c) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1002, 1053(a), 1055, 1056 (d)(1), 1104(a)(1), 1109(a), 1144(a) and (c), and Pub. L. No. 93-406, §1021(c), 88 Stat. 134 (1974). The California statutes involved are California Civil Code Sections 5105 and 5125. The Constitutional and statutory provisions referred to above are set forth in Appendix A, *infra* pp. 1-10.

Questions Presented.

Whether the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 29 U.S.C. §1001 *et seq.*, preempts California's community property laws relating to the division of property in dissolution proceedings to the extent they authorize a state court to order a "qualified" pension trust fund to make a direct payment of benefits to someone other than an "employee", "participant", "beneficiary", or "relative"?

Whether this case should be governed by this Court's recent ruling in *Hisquierdo v. Hisquierdo*, 47 U.S.L.W. 4141 (U.S. Jan. 22, 1979)?

Whether Section 302(c)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §186(c)(5), preempts California's community property laws relating to the division of property in dissolution proceedings

to the extent they authorize a state court to order a pension trust fund, which is jointly administered by management and union trustees, to make a direct payment of benefits to someone other than an employee, his family or dependents?

Whether the court below acted prematurely and improperly in ordering Appellant to make direct payments of benefits to Respondent when less burdensome remedies were potentially available?

Statement of the Case.

On June 15, 1945, Leroy A. Johns (hereinafter "Johns") and Respondent were married in Yuma, Arizona. Sometime thereafter, the couple moved to California where Johns became employed in the plumbing, heating and piping industry.

By virtue of his employment, Johns was covered by a collective bargaining agreement which required that his employer pay contributions into the Appellant trust fund,[1] based upon the number of hours worked.[2]

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[1]Appellant receives contributions from well over 1200 employers, covering in excess of 10,000 active employees. Appellant also processes approximately 25 applications per month for retirement benefits and more than 3700 checks per month for the purpose of paying pension benefits to current retirees.

[2]Section 302 of the National Labor Relations Act, as amended, provides that payments of money by an employer to his employees' representative shall be unlawful except in certain specific, limited situations. The payments by Johns' employer or employers to Appellant trust fund were made pursuant to the Section 302(c)(5) exception. That exception provides in pertinent part that payments by an employer to a trust fund shall be lawful if the contributions are

> "for the sole and exclusive benefit of the employees of such employer, and their families and dependents. Provided, that (a) such payments are held in trust for the purpose of paying either from principal or income

(This footnote is continued on next page)

The trust fund, which on January 1, 1975 became subject to the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), Pub. L. No. 93-406, 29 U.S.C. §1001 *et seq.*, was established and has been administered according to the mandates of Section 302(c)(5) of the National Labor Relations Act (hereinafter "NLRA"), as amended, 29 U.S.C. §186(c)(5). The trust agreement creating Appellant provides for the payment of certain specified retirement benefits to the employee, his family or dependents once specified conditions are met, and contains a "spendthrift" provision which prohibits the "assignment" or "alienation" of benefits until such benefits are actually paid to the retiree.

On February 25, 1976, the Honorable Louis M. Welsh, Judge of the Superior Court of the State of California for the County of San Diego, ordered that Appellant be joined in that certain action entitled *In re the Marriage of Leroy A. Johns and Edith J. Johns*, Case No. DN 11522.

On that same date, Respondent filed with the Superior Court an Application for Order for Payment from the Community Retirement Fund. By said Application, Respondent sought an order instructing Appellant to withhold and to pay directly to Respondent one-half (½) of John's retirement benefits which were

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or both, for the benefit of employees, their families and dependents, . . . pensions on retirement or death of employees, . . . (b) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, . . . (c) such payments as are intended for the purpose of providing pensions or annuities for employees are made to a separate trust fund which provides that the funds therein cannot be used for any purpose other than paying such pensions or annuities; . . . ." 29 U.S.C. §186(c)(5).

at that time, and are today, 100% vested. Appellant opposed the Application asserting, *inter alia*, that the court was without jurisdiction to grant the requested order insofar as ERISA and the NLRA preempt state laws regarding the division of community property in dissolution proceedings.

Pursuant to a stipulation entered into by all the parties, the dissolution proceeding was bifurcated. In the main proceeding, the pension benefits in question were adjudicated community property. Thereafter, on August 9, 1976, the remaining issues were tried without a jury, the Honorable Charles W. Froelich, presiding. After a hearing upon a stipulated set of facts, the court rendered an oral intended decision in favor of Respondent and against Appellant. Thereafter, on September 2, 1976, the court approved Respondent's Proposed Findings of Fact and Conclusions of Law and Proposed Form of Judgment, and ordered that Appellant pay directly to Respondent her one-half (½) community property interest in Johns' periodic retirement benefits.

As previously noted, on November 3, 1976, Appellant filed a timely appeal from the aforementioned order in the Court of Appeal for the Fourth Appellate District of the State of California. Rejecting Appellant's contention that the community property laws which serve as the basis of the order are preempted by ERISA and the NLRA, the Court of Appeal affirmed the trial court's order. Appellant filed a timely Petition for Hearing before the California Supreme Court on November 21, 1978 to contest this decision. This petition was denied, however, on December 20, 1978.

Since Appellant first filed its appeal on November 3, 1976, a number of state and federal courts have

considered the issue of whether ERISA preempts California's community property laws. In *Stone v. Stone,* 450 F.Supp. 919 (N.D. Cal.), *appeal docketed,* No. 78-2313 (9th Cir. 1978); *Carpenters Pension Trust for Southern California v. Kronschnabel,* ..... F.Supp. ..... (C.D. Cal. Oct. 31, 1978), *appeal docketed, 79-*3031 (9th Cir. 1979); *Johnston v. Johnston,* 85 Cal. App. 3d 900, 149 Cal.kptr. 798, *hearing denied* (Dec. 21, 1978), the courts agreed with the position taken by the Court of Appeal below. *Cf. Cody v. Riecker,* 454 F.Supp. 22 (E.D.N.Y. 1978). In *Francis v. United Technologies Corp.,* 458 F.Supp. 84 (N.D. Cal. 1978), however, the court rejected that view, holding that "ERISA has preempted the operation of so much of California's community property laws as purport to give a nonemployee spouse an interest in the plan benefits."

Additionally, in the recent case of *Hisquierdo v. Hisquierdo,* 47 U.S.L.W. 4141 (U.S. Jan. 22, 1979), this Court held California's community property laws to be preempted by the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §231 *et seq.,* to the extent they require the division of benefits under that Act between a railroad employee and his spouse upon divorce. In so ruling, this Court relied heavily upon Section 231m of that Act, 45 U.S.C. §231m, which contains language intended to prevent a railroad employee from being deprived of "a portion of the benefit Congress . . . indicated was designed for him alone." Very similar language can be found in Sections 203(a), 206(d)(1) and 1021(c) of ERISA. 29 U.S.C. §§1053 (a), 1056(d)(1) and Pub. L. No. 93-406, §1021(c), 88 Stat. 134 (1974).

Because of the uncertainty these conflicting decisions have generated in regard to the preemptive effect of ERISA with respect to California's community property laws, numerous employee benefit trust funds have been obliged to incur high litigation costs in an attempt to protect the interests of their participants and to obtain some final resolution of the matter. Moreover, the trust funds will undoubtedly continue to face such high costs until a definitive ruling is rendered by this Court.

Appellant therefore files this timely appeal in order to obtain uniformity of decisions, and to settle important issues of law.

ARGUMENT.

I.

ERISA Preempts State Law to the Extent That It Relates to or Attempts to Regulate Appellant.

A. ERISA Has the Broadest Possible Preemptive Effect.

The question of whether a state may exercise jurisdiction over a pension plan is a question of law to be decided by reference to ERISA and to the legislative history behind that act. ERISA is the culmination of 11 years of legislative work to devise a comprehensive federal regulatory program to supervise, protect and guarantee retirement and other employment benefits promised millions of workers in private industry and to regulate and protect the employee benefit plans which are established and maintained to provide the promised benefits. To eliminate the threat of conflicting or inconsistent state regulation of employee benefit plans, Congress specifically preempted this field of regulation. Section 514(a) of the Act clearly provides that ERISA

> "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in Section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975." 29 U.S.C. §1144 (a) (emphasis added).

Additionally, Section 514(c) provides:

> "(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .
>
> "(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate,

> directly or indirectly, the terms and conditions of employer benefit plans covered by this title." 29 U.S.C. §1144(c).

The legislative history of Section 514 leaves no doubt that Congress intended ERISA to absolutely preempt the field of employee benefit plans. In the initial report on the bill to revise the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§301-309, the House Committee on Education and Labor commented as follows:

> "Except where plans are not subject to this Act and in certain other enumerated circumstances, *state law is preempted*. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law . . . ." House Report (Education and Labor Committee) No. 93-533 (October 2, 1973) (emphasis added).

Similarly, after consideration of the bill by both the House and the Senate, the Joint Explanatory Statement of the Committee of Conference stated:

> "[T]he provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by any employee organization that represents employees or affecting interstate commerce." House Conference Report No. 93-1280 (August 12, 1974).

Further, in introducing the Conference Report on ERISA, Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, stated:

> "It should be stressed that with the narrow exceptions specified in the bill *the substantive and*

enforcement provisions of the conference substitute are intended to preempt the field for federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force and effect of law." 120 Cong. Rec. S. 15, 737 (August 22, 1974) (emphasis added).

Case law also supports the position that ERISA preempts any and all state laws which may be inconsistent with the Act's intended effect upon employee benefit plans. In *Azzaro v. Harrett*, 414 F.Supp. 473 (S.D.N.Y. 1976), the court enjoined the State Superintendent of Insurance from inquiring into a participant's benefit status, stating:

"The legislative history of ERISA shows that Congress intended absolute preemption of employee benefit plans . . . .

"Preemption of the field was intended to provide uniform regulation of employee benefit plans . . . .

* * * *

"In order to prevent [the] contravention of the purpose of ERISA, the exception to federal regulation provided in Section 1144(b)(1)[3] must be narrowly construed to limit state regulation to what is essentially a cleanup role, that is, to the disposition of causes of action and disputes

[3]The exception contained in 29 U.S.C. §1144(b)(1) is not applicable to the instant suit. That section provides for a limited exception for a cause of action, act or omission which arose or occurred prior to the effective date of the act.

with respect to employee benefit plans existing before January 1, 1975." *Id.* at 474-75.

Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294 (N.D. Cal. 1977), contains perhaps the most exhaustive treatment of ERISA's preemptive provisions. After reviewing the terms of the statute and its legislative history, Judge Renfrew concluded:

"Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supersede state regulation of benefit plans such as plaintiff's is indisputable." *Id.* at 1300.

See also Wayne Chemical, Inc. v. Columbus Agency Service Corp., 426 F.Supp. 316 (N.D. Ind. 1977); *cf. Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1976) (the application of state insurance law concepts to a collectively bargained-for pension plan was rejected on the ground that application of such law was contrary to federal policy).

The United States Department of Labor, Division of Pension and Welfare Programs, the federal agency responsible for the administration and enforcement of ERISA, has unequivocally determined that ERISA preempts all state law relating to employee benefit plans. In a letter to Willie D. Barnes, California Corporation Commissioner, dated July 14, 1976, James D. Hutchinson wrote:

> "The effect of this section [514] is to preempt all state laws which relate to employee benefit plans subject to the coverage of Title 1 of ERISA (Protection of Employee Benefit Rights), whether such state laws conflict with the terms of the federal legislation or would merely supplement the federal scheme."

Accordingly, it is quite clear that ERISA occupies the field to the exclusion of any state regulation of employee benefit plans or trust funds covered by ERISA. Thus, inasmuch as the order below directs Appellant as to both how much and to whom retirement benefits must be paid, the court's order constitutes a prohibited regulation by the state of an employee benefit trust fund subject to ERISA, in direct contravention to the requirements of ERISA.

B. An Analysis of Existing Case Law Substantiates That ERISA Preempts California's Community Property Laws in the Instant Case.

This Court has upheld the federal preemption of state community property laws where the Congressional intent to do so is express. In *Wissner v. Wissner*, 338 U.S. 665 (1949), an army officer designated his mother as the beneficiary to the proceeds of his national service life insurance policy. The officer's widow, claiming to be entitled under California community property laws to one-half of the proceeds, brought suit therefor. The California District Court of Appeal affirmed a judgment in the widow's favor, but this Court reversed it. Noting that Congress had expressly provided in the National Service Life Insurance Act that a chosen beneficiary is to be the sole owner of insurance proceeds, it held California's community property laws to be preempted to the extent they operate to designate a payee. *See also Hisquierdo v. Hisquierdo*, 47 U.S.L.W. 4141 (U.S. Jan. 22, 1979) (discussed *infra* at pp. 20-22, 27-28).

In the more recent case of *Teamsters v. Daniel*, 47 U.S.L.W. 4135 (U.S. Jan. 16, 1979), this Court rejected the contention that an employee's interest in a non-contributory, compulsory pension plan is a "security" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934 largely because of the comprehensiveness of ERISA's regulatory scheme.

> "If any further evidence were needed to demonstrate that pension plans of the type involved here are not subject to the Securities Acts, the enactment of ERISA in 1974 would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. . . .
>
> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to non-contributory, compulsory pension plans. Congress believed it was filling a regulatory void when it enacted ERISA. . . ." *Id.* at 4139.

This analysis must be said to apply with equal force to the issue of whether ERISA "occupies the field" to the exclusion of California's community property laws.

The United States District Court for the Northern District of California had occasion to interpret Section 514 and the legislative history relating to its enactment in *Francis v. United Technologies Corp.*, 458 F.Supp.

84 (N.D. Cal. 1978), a case factually identical to the one at hand. In a carefully reasoned opinion, Judge Poole concluded that the specific intent of Congress was to preempt *all* inconsistent state laws. Specifically rejecting the view of a fellow District Court Judge within his district, Judge Poole concluded that

> "[the language of ERISA] was intended to effect the broadest possible preemption of State law. The inclusion of all State laws which 'relate to' any ERISA plan was an attempt to make this preemption cover laws which were not specifically directed at this subject area, but which still affected it." *Id.* at 86.

It is certainly true that not all courts which have considered the issue have agreed with Judge Poole's conclusion that ERISA precludes a court from ordering a trust fund, such as Appellant, to make payments directly to a non-participant former spouse pursuant to California community property laws. *See Stone v. Stone,* 450 F.Supp. 919 (N.D. Cal.), *appeal docketed,* No. 78-2313 (9th Cir. 1978); *Carpenters Pension Trust for Southern California v. Kronschnabel,* ..... F.Supp. ..... (C.D. Cal. Oct. 31, 1978), *appeal docketed,* 79-3032 (9th Cir. 1979); *Johnston v. Johnston,* 85 Cal.App.3d 900, 149 Cal.Rptr. 798, *hearing denied* (Dec. 21, 1978); *cf. Cody v. Riecker,* 454 F.Supp. 22 (E.D.N.Y. 1978). A careful review, however, of one of the cases cited above, *Stone v. Stone,* clearly demonstrates that ERISA should, and does in fact, preempt such application. This is especially true where, as here, application of the community property rules would result in the payment of pension benefits to a non-employee *former* spouse who is neither a participant nor a beneficiary under the pension plan.

The *Stone* decision recognizes that "Section 514(a) certainly was intended to have broad preemptive effect, and State laws which *relate to* employee benefit plans differently than ERISA *relates to* them are generally preempted." *Stone v. Stone, supra* at 932 (emphasis added). Nonetheless, the Court argued that because the Act does not explicitly prohibit the transfer of benefits under California's community property laws, courts are not precluded from ordering the same. Appellant respectfully submits, however, that the inherent protective nature of the Act requires that such transfers be prohibited.

C. This Court's Hisquierdo Ruling Requires That California's Community Property Laws Be Held Preempted in the Instant Case.

Appellant recognizes that, as a matter of general policy, the " 'whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the state and not to the laws of the United States.' *Buechold v. Ortiz,* 401 F.2d 371 (9th Cir. 1968), *quoting Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383 (1930)." *Stone v. Stone, supra* at 924. This general policy of federal non-interference, however, should not be applied in the specific instance where Congress, as here, has acted expressly to protect a pensioner from involuntary forfeiture, alienation, or assignment of his pension benefits.

ERISA contains three separate sections designed to prevent the "forfeiture", "assignment", or "alienation" of an "employee's" benefits under a pension plan. Section 203(a) provides that a pension plan *must* make "an employee's right to his normal retirement benefit . . . *nonforfeitable*" in accordance with three optional

vesting schedules. 29 U.S.C. §1053(a) (emphasis added). Similarly, Section 206(d)(1) of the Act states:

> "Each pension plan *shall provide* that benefits provided under the plan *may not be assigned or alienated.*" 29 U.S.C. §1056(d)(1) (emphasis added).

Finally, Section 1021(c) states in pertinent part:

> "Section 401(a) [of the Internal Revenue Code of 1954, 26 U.S.C. §401(a)] is amended by inserting after paragraph (12) the following new paragraph:
>
> "'(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan *may not be assigned or alienated* . . . .'" Pub. L. No. 93-406, §1021(c), 88 Stat. 134 (1974) (emphasis added).

It should be noted that ERISA speaks in terms of employees only, making no reference to former spouses of employees. *See Kerbow v. Kerbow,* 421 F.Supp. 1253 (N.D. Tex. 1976). Obviously this fact is not the result of oversight, for Congress defined the Act's material terms with care so that they could be applied with precision. Section 3 of the Act provides in pertinent part:

> "For purposes of this title:
>
> * * * *
>
> "(6) The term 'employee' means any individual employed by any employer.
>
> "(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive

> a benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> "(8) The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.
>
> * * * *
>
> "(15) The term 'relative' means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant." 29 U.S.C. §1002.

Additionally, the fiduciary responsibilities recognized or created by the Act are clearly intended to protect the employee-participants and their dependents or beneficiaries, and no one else. Section 404(a)(1) of ERISA provides, in pertinent part:

> "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (a) for the exclusive purpose of:
>
> "(i) providing benefits to participants and their beneficiaries; and
>
> "(ii) defraying reasonable expenses of administering the plan; . . ." 29 U.S.C. §1104(a)(1).

Finally, Section 205 of ERISA (29 U.S.C. §1055), which specifies that a pension plan must provide that benefits shall be paid in the form of a "qualified joint survivor annuity" unless the employee elects otherwise, makes no provision for the former spouse of either an employee or a participant. Rather, it provides for the income protection of an employee and his spouse for the lifetime of both. In this connection,

the observation of a commentator in a recent law review article is instructive.

> "It appears to be the express intent of Congress that no other beneficiary but the employee's *spouse* should benefit from the retirement plan upon the death of the employee." Thiede, "The Community Property Interest of the Non-Employee Spouse on Private Retirement Benefits", 9 U.S.F.L. Rev. 635, 646 (1975) (emphasis added).

This Court recently considered the preemptive effect of a similar statutory scheme in *Hisquierdo v. Hisquierdo*, 47 U.S.L.W. 4141 (U.S. Jan. 22, 1979). In that case, the California Supreme Court had held that such portion of a railroad employee's retirement benefits as had accrued during his marriage under the federal Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §231 *et seq.*, were divisible as community property between he and his wife upon their divorce. The petitioner-employee had contended that his wife's claim was barred by Section 231m of that act which provides:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be *assignable* or be subject to any tax or garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." 45 U.S.C. §231m (emphasis added).

The California Supreme Court rejected this contention, however, reasoning that Section 231m was only intended to prevent creditors from reaching a railroad employee's benefits under the Act.

This Court "granted *certiorari* to consider whether, under the standard of [its] decided Supremacy Clause cases, the award to respondent impermissibly conflicts with the Railroad Retirement Act." *Hisquierdo, supra*, 47 U.S.L.W. at 4143. After noting the similarities between that Act and a private pension program, this Court reversed the judgment of the California Supreme Court, stating:

> "Section 231m plays a most important role in the statutory scheme. Like anti-attachment provisions generally, it ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process '[n]otwithstanding any other law . . . of any State.' . . . . It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of congressional policy."
>
> * * * *
>
> "We . . . cannot so lightly discard the settled view that anti-assignment statutes have substantive meaning. Section 231m goes far beyond garnishment. It states that the annuity shall not be subject to any 'legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' Its terms make no exception for a spouse. The judicial construction on which respondent relies is a child of equity, not law." *Hisquierdo, supra*, 47 U.S.L.W. at 4144-45 (citations omitted).

As noted above, Petitioner's pension plan contains a spendthrift provision which prohibits the assignment or alienation of benefits provided under the plan. Article VI, Section 6 of this plan, which was included to comply with the mandates of Sections 206(d)(1) and

1021(c) of ERISA (29 U.S.C. §1056(d)(1) and Pub. L. No. 93-406, §1021(c), 88 Stat. 134 (1974)), states:

> "Any . . . prospective pension, right or interest shall not be subject in any manner to . . . interference by operation of law or otherwise, and shall be exempt from . . . legal or equitable process or proceeding."

This provision, and the pertinent ERISA sections it effectuates, should be given the same interpretation that this Court gave to Railroad Retirement Act Section 231m, 45 U.S.C. §231m, in *Hisquierdo*. That is, ERISA should be held to prohibit the involuntary division of benefits under the plan between a participant and his former spouse, notwithstanding the contrary requirements of California's community property laws. In the same vein, the order of the court below instructing Appellant to make direct payments to Respondent should be held illegal and unenforceable as in contravention of the express provisions of both ERISA and the pension plan.

D. Other Considerations Dictate Against Affirming the Order of the Superior Court.

Several considerations make inadvisable an affirmation of the order of the Superior Court below. First, if Appellant accedes to that order, its trustees may be exposed to personal liability for breaching their fiduciary responsibilities pursuant to Section 409 of ERISA.[4]

[4]Section 409(a) provides:

> "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act." 29 U.S.C. §1109.

Second, employee benefit plans subject to ERISA must send information about benefits and other concerns to each participant and beneficiary. If Respondent were permitted to obtain an assignment, as the court's order below necessarily confers, she would be entitled to receive such information, thereby doubling the administrative work involved. The Court of Appeal below simply shrugged off this factor by concluding, apparently via judicial notice, that: "In this day of computer technology, the burden on the Fund to make out two checks and envelopes, rather than one, is insignificant." Appendix B, *infra* pp. 11-12. The court's analysis, however, misses the point. ERISA specifically provides that the state courts may not increase the administrative burden *at all*. Moreover, the court viewed this matter in a total vacuum. It did not consider the fact that many participants marry and divorce several times during their pension-accruing years. Nor did the court consider the fact that the fund receives contributions for well over 10,000 active workers and pays retirement benefits to more than 3,700 current retirees. Thus, the administrative burden created by the trial court and approved by the Court of Appeal in its decision below clearly is *not* "insignificant." Indeed, if this decision is allowed to stand, the administrative burden may well affect the level of benefits which the Fund is able to provide.

Moreover, the Pension Benefit Guarantee Corporation, created by Congress, insures pension benefits.

It is self-evident, therefore, that the granting of an assignment to any other person would increase Appellant's per capita insurance premiums, in addition to the increased liabilities and administrative costs. Thus, the court's order below clearly directs Appellant to incur additional administrative costs and liabilities, and thereby effectively regulates Appellant in violation of the comprehensive federal scheme embodied in ERISA.

The unmistakable intent of Congress is to deprive all state courts of jurisdiction to grant or enforce against Appellant the injunctive order sought and obtained by Respondent in the court below. Congress clearly feared that the application of state law would disrupt the regulatory program that it had so carefully constructed. Accordingly, it is respectfully submitted that the decision below must be reversed.

II.

The National Labor Relations Act, as Amended, Further Preempts the Application of State Law to the Instant Controversy.

The National Labor Relations Act, 29 U.S.C. §151 *et seq.*, further supports the position that the state courts are without jurisdiction to regulate or affect Appellant. As noted earlier, Appellant exists by virtue of and operates pursuant to the provisions of Section 302(c)(5) of the NLRA. ERISA does not purport to preempt, alter, modify or supersede this section or any other federal law governing pension plans.[5] Section 514(d). As was ERISA, the NLRA and its amendments were enacted primarily for the benefit

[5]Except as provided in sections 111 and 507(b), 29 U.S.C. §§1031 and 1137(b). The exceptions, however, are not relevant to the instant controversy.

and protection of employees. More importantly, the Section 302(c)(5) exception to the general prohibitions contained in Section 302(a) provides that employers may contribute to jointly administered trust funds which are established and maintained "*for the sole and exclusive benefit of the employees of such employer, and their families and dependents. . . .*" 29 U.S.C. §186(c)(5) (emphasis added).

By directing Appellant to pay retirement benefits directly to Respondent, the court below is ordering the payment of money to someone other than an employee, his family or dependents. Once the familial connection of marriage is severed, federal law *absolutely prohibits* payments to an ex-spouse. Thus, if Appellant complied with the order below, the trust fund would no longer be maintained for the sole and exclusive benefit of employees and their families. As such, all contributions by all employers to Appellant would violate the precise mandates of Section 302, and would, in turn, give rise to potential criminal liability pursuant to section 302(d).[6]

In line with the obvious congressional intent, the courts have broadly construed the prohibitions and have narrowly construed the exceptions contained in Section 302. To date, the most definitive construction of Section 302(c)(5) is found in *In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374 (2nd Cir.), *cert. denied*, 414 U.S. 1002 (1973). In that case, the court noted

[6]Section 302(d) provides:

"Any person who wilfully violates any of the provisions of this Section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." 29 U.S.C. §186(d).

that Section 302 was primarily intended to prevent employers from tampering with the loyalty of union officials and to prevent union officials from exacting improper payments from employers. It noted further, that the prohibitions and exceptions thereto are clear and unambiguous. The trust fund exception, the court continued, was intended to assure that monies deducted from an employee's wages would be used to benefit those employees for whom the contributions were made. In holding that Section 302(c)(5) prohibits the payment of benefits to employees of non-contributing employers, the court stated:

> "While it may be that Congress in enacting section 302 did not intend to prohibit the type of trust fund at issue here, this court is bound, nonetheless, by the express statutory language that only payments by an employer to the 'trust fund . . . for the sole and exclusive benefit of the employees of such employer . . .' are exempt from the general prohibitions of section 302. Where several employers have agreed in negotiations with a union to set up a section 302 trust for the benefit of union members, it is clear beyond cavil that '[o]nly employees and former employees of employers who are lawfully contributing to [the] union . . . trust fund may qualify as beneficiaries.'" *Id.* at 375 (citations omitted).

For the foregoing reasons, Appellant cannot, consistent with federal law, provide direct retirement benefit payments to former spouses of employees, such as Respondent. Since ERISA and the NLRA absolutely preempt the field, and since the court below misguidedly attempted to direct Petitioner to commit an illegal and improper act, based upon its application of California community property law, the decision below is void and unenforceable as a matter of law. Accordingly, it is respectfully submitted that the decision below must be reversed.

III.

Alternative Remedies for Securing Respondent's Community Property Claim.

Appellant does not take the position herein that Johns' retirement benefits may not be characterized as community property. It merely contends that a state court may not direct it to make a distribution directly to a non-participant, and thereby impose state regulation on a federally regulated pension plan.

In *Hisquierdo v. Hisquierdo, supra,* this Court considered the permissibility under the Railroad Retirement Act of two alternative approaches to securing a non-participant/spouse's claim to her community property share of retirement benefits which accrued during marriage. The first was for the trial court to retain jurisdiction and order the participant/spouse to pay the non-participant/spouse an appropriate portion of his benefits as he receives them. The Court rejected this approach, however, stating that it "runs contrary to the language and purpose of §231m" because it "would mechanically deprive petitioner of a portion of a benefit Congress . . . indicated was designed for him alone." *Hisquierdo, supra,* 47 U.S.L.W. at 4144.

The second approach was for the trial court to make an award to the non-participant spouse, out of presently available community property, of an amount sufficient to compensate her for her interest in the participant/spouse's anticipated benefits. The

Court rejected this alternative as well on the ground that it "would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check." *Hisquierdo, supra,* 47 U.S.L.W. at 4145. More specifically, however, it found this proposed remedy unattractive because it conflicted with the prohibition against the "anticipation" of benefits found in Section 231m of the Act. 45 U.S.C. §231m.

Both of these approaches would appear to be potentially present in the instant case. If for any reason one or both are found to be permissible under ERISA, in contrast to the Railroad Retirement Act, the court below can be said to have acted prematurely and improperly by attempting to impose upon Appellant the duty to divide and distribute the community assets. For there is no suggestion in the record on appeal that Johns was in any way reluctant to obey the trial court's lawful orders or that Respondent had any difficulty whatsoever in receiving her share of the community property. Moreover, even if all community assets, exclusive of the retirement benefits in question, were divided equally between the parties, there are no facts to suggest that Johns would refuse to pay Respondent her one-half (½) community property interest as the periodic benefits are received.

If, on the other hand, both remedies are found to be prohibited under ERISA for analogous reasons, logic compels this Court to hold an order instructing Appellant to make a direct distribution to Respondent to be barred as well.

Conclusion.

Upon the strength of the foregoing, it is clear that ERISA and the NLRA preempt the application of state law where such application would regulate, affect or relate to an employee benefit plan. Since the court below applied state community property law to direct Appellant to pay retirement benefits directly to Respondent, the judgment is clearly state action which improperly attempts to regulate a federally regulated trust fund. Moreover, to the extent that the court below could have legitimately ordered Johns to either pay Respondent a proportionate amount of his benefits as received or an amount out of existing community assets sufficient to compensate her for her entire community share of those benefits, it acted prematurely and improperly in ordering Appellant to make direct payments to her. In any case, Appellant respectfully submits that the decision of the Court of Appeal below must be reversed.

Dated: March 14, 1979.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

1. Article VI, Clause 2 of the United States Constitution (U.S. Const. art. VI, cl. 2) provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Section 302(c)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §186(c)(5), provides in pertinent part:

> "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or

unemployment benefits or life insurance, disability and sickness insurance, or accident insurance. . . ."

3. Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002, provides in pertinent part:

"(6) The term 'employee' means any individual employed by an employer.

"(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

"(8) The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

* * *

"(15) The term 'relative' means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant."

4. Section 203(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1053(a), provides in pertinent part:

"(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . ."

5. Section 205 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1055, provides:

"(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

"(b) In the case of a plan which provides for the payment of benefits before the normal retirement age as defined in section 3(24), the plan is not required to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity during the period beginning on the date on which the employee enters into the plan as a participant and ending on the later of—

(1) the date the employee reaches the earliest retirement age, or

(2) the first day of the 120th month beginning before the date on which the employee reaches normal retirement age.

"(c)(1) A plan described in subsection (b) does not meet the requirements of subsection (a) unless, under the plan, a participant has a reasonable period in which he may elect the qualified joint and survivor annuity form with respect to the period beginning on the date on which the period described in subsection (b) ends and ending on the date on which he reaches normal retirement age if he continues his employment during that period.

(2) A plan does not meet the requirements of this subsection unless, in the case of such election, the payments under the survivor annuity are not less than the payments which would

have been made under the joint annuity to which the participant would have been entitled if he had made an election under this subsection immediately prior to his retirement and if his retirement had occurred on the date immediately preceding the date of his death and within the period within which an election can be made.

"(d) A plan shall not be treated as not satisfying the requirements of this section solely because the spouse of the participant is not entitled to receive a survivor annuity (whether or not an election has been made under subsection (c)) unless the participant and his spouse have been married throughout the 1-year period ending on the date of such participant's death.

"(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

"(f) A plan shall not be treated as not satisfying the requirements of this section solely because, under the plan there is a provision that any election under subsection (c) or (e), and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period (not in excess of 2 years) beginning on the date of such election or revocation,

as the case may be. The preceding sentence does not apply unless the plan provision described in the preceding sentence also provides that such an election or revocation will be given effect in any case in which—

(1) the participant dies from accidental causes,

(2) a failure to give effect to the election or revocation would deprive the participant's survivor of a survivor annuity, and

(3) such election or revocation is made before such accident occurred.

"(g) For purposes of this section:

(1) The terms 'annuity starting date' means the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability).

(2) The term 'earliest retirement age' means the earliest date on which, under the plan, the participant could elect to receive retirement benefits.

(3) The term 'qualified joint and survivor annuity' means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single annuity for the life of the participant.

"(h) For the purposes of this section, a plan may take into account in any equitable fashion (as determined by the Secretary of the Treasury)

any increased costs resulting from providing joint and survivor annuity benefits under an election made under subsection (c).

"(i) This section shall apply only if—

(1) the annuity starting date did not occur before the effective date of this section, and

(2) the participant was an active participant in the plan on or after such effective date."

6. Section 206(d)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1056(d)(1) provides:

"(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

7. Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1104(a)(1), provides:

"(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title."

8. Section 409(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1109(a), provides:

"(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduicary may also be removed for a violation of section 411 of this Act."

9. Section 514(a) and (c) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144 (a) and (c), provides:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

"(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

10. Section 1021(c) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, §1021(c), 88 Stat. 134 (1974) provides:

"(c) RETIREMENT BENEFITS MAY NOT BE ASSIGNED OR ALIENATED.— Section 401 (a) is amended by inserting after paragraph (12) the following new paragraph:

'(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or

beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on the date of the enactment of the Employee Retirement Income Security Act of 1974.' "

11. Cal. Civ. Code §5105 provides:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

12. Cal. Civ. Code §5125 provides:

"(a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

"(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, *without the written consent of the other spouse.*

"(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the

home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

"(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest."

APPENDIX B.

Copy of the Decision of the Court of Appeal, Fourth Appellate District, Division One, of the State of California, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978).

"OPINION

BROWN (Gerald), P.J.—(1) The respondent Edith J. Johns owned one-half of the retirement benefits listed under her husband's name (Civ. Code, §5105). The retirement benefits were 100 percent community property and were entirely vested. Upon divorce the superior court ordered appellant Retirement Fund Trust to pay one-half the retirement directly to Edith. The former husband does not complain in the appeal but the fund does, saying, under federal preemption, it should pay the benefits solely to the husband, and Edith can take her chances collecting from him.

We find no impediment to the fund sending a monthly check to the half-owner Edith. In this day of computer technology, the burden on the fund to make out two checks and envelopes, rather than one, is insignificant.

Edith has as much right to manage and control the community property as her former husband (Civ. Code, §5125).

We hold the Employee Retirement Income Security Act of Congress (ERISA) does not preempt California law as applied here in matrimonial matters (*In re Marriage of Fithian*, 10 Cal. 3d 592, 597 [111 Cal. Rptr. 369, 517 P. 2d 449]; *In re Marriage of Sommers*, 53 Cal. App. 3d 509, 515 [126 Cal. Rptr. 220]; see *Cody v. Riecker*

(E.D.N.Y. 1978) 454 F. Supp. 22; *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919; cf. *Francis v. United Technologies Corp.* (N.D. Cal. 1978) —F.Supp.—). The spendthrift features of ERISA are not applicable because Edith is an owner, not a creditor. See Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Retirement Benefits* (1975) 9 U.S.F. L.Rev. pages 635, 650.

Judgment affirmed.

Cologne, J., and Wiener, J., concurred."

APPENDIX C.

Copy of the Minute Order of the California Supreme Court Denying Appellant's Petition for Hearing.

"SUPREME COURT MINUTES
WEDNESDAY, DECEMBER 20, 1978
SAN FRANCISCO, CALIFORNIA

* * *

4 Civ.

16316

Div. 1

Johns v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California
Appellant's petition for hearing DENIED."

APPENDIX D.

Notice of Appeal to the Supreme Court of the United States.

Filed March 2, 1979 in the Court of Appeal, Fourth Appellate District, State of California.

Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, Appellant, vs. Edith J. Johns, Respondent. 4th Civil No. 16316.

NOTICE IS HEREBY GIVEN that the RETIREMENT FUND TRUST OF THE PLUMBING, HEATING AND PIPING INDUSTRY OF SOUTHERN CALIFORNIA, the above named Appellant, hereby appeals to the Supreme Court of the United States from the judgment of the Court of Appeal, Fourth Appellate District, of the State of California entered in this action on October 13, 1978. Said judgment, which affirmed the order of the Honorable Charles W. Froelich, Judge of the Superior Court of the State of California for the County of San Diego, requiring Appellant to make direct payments to Respondent, became final on December 20, 1978, when the California Supreme Court denied Appellant's Petition for Hearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: February 26, 1979.

HILL, FARRER & BURRILL
STUART H. YOUNG, JR.
JAMES G. JOHNSON
FRED T. ASHLEY
/s/ By James G. Johnson
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1422

RETIREMENT FUND TRUST OF THE PLUMBING, HEATING AND PIPING INDUSTRY OF SOUTHERN CALIFORNIA,
Appellant,

vs.

EDITH J. JOHNS,
Appellee.

Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

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vs.

EDITH J. JOHNS,

Appellee.

Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the following grounds:

1. The appeal does not present a substantial federal question.

2. The judgment of the Supreme Court of the State of California rests on an adequate non-federal basis.

Statement of the Case.

This appeal was submitted to the Court of Appeal of the State of California on an agreed statement pursuant to Rule 6(a) of the California Rules of Court. The pertinent facts were and are that Leroy A. Johns, hereinafter referred to as "Johns", was the husband of appellee; that during his marriage to appellee, Johns accumulated retirement credits, and is 100% vested in his pension fund, and is now and was at the time of the dissolution proceedings, receiving retirement benefits from appellant, Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California; the retirement benefits are wholly community property; all of these funds were earned during the marriage and are 100% community property. The Court of Appeal affirmed the trial court, and the California Supreme Court denied appellant's petition for hearing on December 20, 1978.

ARGUMENT.

1. The Appeal Before This Court Does Not Present a Substantial Federal Question.

Appellant's jurisdictional statement states that the grounds for the appeal is an alleged conflict between California community property law [Civil Code Sections 5105 and 5125] and federal law [the Federal Constitution (Article VI, Cl. 2); the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §1001 *et seq.*); and the National Labor Relations Act (NLRA), 29 USC §186 (C)(5)]. *Jurisdictional Statement*, page 2.

Appellant's argument in support of this alleged conflict ignores the fact that the federal law and the state law have as their objectives entirely different purposes.

The state law deals only with the relationships between spouses and their interests in community property. Only in limited instances, when a *federally* created right has been classified as community property, has this court refused to recognize the power of the state to determine the ownership of community property and direct its division. See: *Wissner v. Wissner,* 338 US 665 (1949) [National Service Life Insurance]; *Free v. Bland,* 369 US 663 (1962) [United States Savings Bonds]; *Hisquierdo v. Hisquierdo,* ..... US ....., 47 USLW 4141 (Jan. 22, 1979) [Railroad Retirement Act Benefits].

The federal laws, ERISA and NLRA, do not conflict with the state law, although if they did so conflict,

the state law would fall under the Federal Constitution. US Const. Article VI, Cl. 2.

ERISA was enacted and signed into law to provide ". . . safeguards . . . with respect to the *establishment, operations,* and *administration* of private employee benefit plans," and to establish ". . . minimum standards . . . assuring the equitable character of such plans and their financial soundness . . . [and to establish] standards of conduct, responsibility and obligations of fiduciaries." [Emphasis added] [ERISA §2 (29 USC §1011)]; see also 1974 US Code Congressional and Administrative News, 4639, *et seq.;* all other provisions of ERISA, particularly those dealing with preemption of state law.

Section 514(a) of ERISA [29 USC §1144(a)] has been cited by Appellant to support the argument for preemption. This section reads as follows:

> "(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws in so far as they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempt under Section 4(b). This section shall take effect on January 1, 1975."

Section 514(c) of ERISA [29 USC §1144(c)] reads as follows:

> "(c) For purposes of this Section:
>
> "(1) The term 'State law' includes all laws, decisions, rules, regulations, or other state action having the effect of law of any state. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

> "(2) The term 'State' includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, *the terms and conditions* of employee benefit plans covered by this title."

The entire thrust of §514 of ERISA (29 USC §1144) is that a state shall not regulate or apply state law to establish standards of conduct, responsibilities or obligations of fiduciaries with respect to the administration, establishment or operation of covered plans. See: *Carpenters Pension Trust for Southern California v. Kronschabel,* 460 F. Supp. 978.

It is clear that the intent of ERISA, as set forth in the plain language of the act (§2 *supra*) does not conflict with the state scheme of division of community property, much less do "major damage" to "clear and substantial" federal interests required to override state family and family property law. *United States v. Yazell,* 382 US 341 (1966).[1]

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[1]It is of note that the ERISA Improvement Act of 1979 (S209) has been introduced and contains provisions designed to eliminate even the appearance of preemption. Section 155 of that Bill reads in part:

"Section 155. Preemption.

"Section 514 of the act is amended by . . .

"(2) adding a new subsection (b)(6) to read as follows:

"(6) Subsection (a) shall not apply respecting any judgment, decree, or order pursuant to a state domestic relations law (whether of the common law or community property type) if such judgment, decree or order is described in Section 206(d)(3)."

The proposed Section 206(d)(3) is contained in Section 128 of S209 and reads as follows:

"Section 128. Alimony and Support Payments.

"Section 206 of such Act is amended by adding at the end thereof the following new paragraph:

"(3) Paragraph (1) shall not apply in the case of any judgment, decree or order (including an approval of a property settlement agreement) pursuant to a State Domestic relations

(This footnote is continued on next page)

Likewise, the National Labor Relations Act enacted to prevent employees from tampering with the loyalty of union officials and to prevent union officials from extracting improper payments from employees, *In re Typo-Publishers Outside Tape Fund,* 478 F. 2d 372 (2d Cir., 1973), does not in any way conflict with the California law which determines ownership of employee fringe benefits.

Although Appellant places great emphasis on the recent decision of this court in *Hisquierdo v. Hisquierdo,* ..... US ....., 47 USLW 4141 (1979), the explicit language of footnote 24 on page 18 of that opinion makes further discussion of the *Hisquierdo* opinion irrelevant to the instant appeal.

2. The Judgment of the Court of Appeal of the State of California Rests on an Adequate State Ground.

The decision of the Court of Appeal in the instant case holds that the Appellee claims a one-half ownership of the benefits in her spouse's retirement benefits. 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978).

This concept of ownership by the community is not new, see *Phillipson v. Board of Administration,* 3 Cal. 3d 32, 89 Cal. Rptr. 61, 473 P. 2d 649 (1970); *Waite v. Waite,* 6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P. 2d 13 (1972); *In re Marriage of Brown,* 15 Cal. 3d 838, 126 Cal. Rptr. 633,

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law (whether of the common law or community property type) which

"(A) affects the marital property rights of any person in any benefit payable under a pension plan or the legal obligation of any person to provide child support or make alimony payments, and,

"(B) does not require a pension plan to alter the effective date, timing, form, duration or amount of any benefit payments under the plan or to honor any election which is not provided for under the plan or which is made by a person other than a participant or beneficiary."

544 P. 2d 561 (1976), and has been approved, at least inferentially, by this court. *In re Marriage of Fithian,* 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P. 2d 449, *cert. den.* 419 US 425, *rehrg. den.* 419 US 1060 (1974). See also *Hisquierdo v. Hisquierdo,* ..... US ....., 47 USLW 4141 (1979), fn. 14, opinion p. 8.

California community property law merely assures that the property rights of the non-working spouse are protected. The order of the Superior Court and the opinion of the Court of Appeal merely assure that the non-working spouse receives that to which she is entitled without the necessity of continually resorting to legal process to enforce her rights.

Conclusion.

It is submitted, that the case at bar does not present a substantial federal question and that the judgment of the Court of Appeal rests on an adequate State ground. Appellee, therefore, moves that the appeal herein be dismissed.

Respectfully submitted,

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Appellant,

vs.

EDITH J. JOHNS,

Respondent.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Appellant,

vs.

EDITH J. JOHNS,

Respondent.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Appellant, pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States, hereby opposes Appellee's Motion to Dismiss.

Statement of the Case.

The Court is respectfully referred to the STATEMENT OF THE CASE included in Appellant's brief on appeal from the Supreme Court of California.

ARGUMENT.

Appellee bases her motion to dismiss the appeal herein on the following two grounds: (1) that "the appeal does not present a substantial federal question"; and (2) that the judgment appealed from is founded on an adequate and independent state ground. Appellee's Brief at 3. As will be shown below, both of these allegations are totally without substance.

1. The Appeal Before This Court Does Present a Substantial Federal Question.

In support of her contention that a substantial federal question is lacking here, Appellee first argues that the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), Pub. L. No. 93-406, 29 U.S.C. §1001, *et seq.*, does not preempt California community property law because "the federal law and the state law have as their objectives entirely different purposes". Appellee's Brief at 3. The state community property laws, she says, "*deals only* with the relationships between spouses and their interests in community property." Appellee's Brief at 3 (emphasis added). ERISA, on the other hand, she states

> "was enacted . . . to provide '. . . safeguards . . . with respect to the *establishment, operations,* and *administration* of private employee benefit plans,' and to establish '. . . minimum standards . . . assuring the equitable character of such plans and their financial soundness . . . [and to establish] standards of conduct, responsibility and obligations of fiduciaries.'" Appellee's Brief at 4.

Having so characterized the objectives of the two statutory schemes under consideration, she concludes:

> "It is clear that the intent of ERISA . . . does not conflict with the state scheme of *division* of community property . . . ."[1] Appellee's Brief at 5 (emphasis added).

This argument is clearly intended to mislead the Court regarding the subject of this appeal. Appellant has not, and does not now, contend that the mere "division" of marital assets, including retirement benefits such as those involved in the instant controversy, is precluded by ERISA. As Appellant pointed out in Section III of its brief on appeal, there are at least two alternative ways in which such a "division" could be accomplished without conflicting with the statutory scheme as set forth in ERISA.[2]

Appellant does take the position, however, that to the extent that California community property law authorizes a state court to *order* an ERISA regulated pension trust fund to make a direct distribution of benefits to the former spouse of a plan participant, it runs afoul of Section 514(a) of ERISA, 29 U.S.C. §1144(a), which expressly preempts all state laws which "relate to" employee benefit plans. Surely it

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[1]It is interesting to note that Appellee reached this conclusion after conceding that Section 514(a) of ERISA, 29 U.S.C. §1144(a), expressly preempts "'. . . all state laws in so far as they may now or hereafter relate to any employee benefit plan . . . .'" Appellee's Brief at 4.

[2]The first is for the trial court to retain jurisdiction and order the participant/spouse to pay the non-participant/spouse an appropriate portion of his benefits as he receives them. The second is for the trial court to make an award to the non-participant spouse, out of presently available community property, of an amount sufficient to compensate her for her interest in the participant/spouse's anticipated benefits.

must be conceded that such an *order* does not "deal only" with marital relationships and the interests of spouses in community property. It vitally affects the "'. . . *operations*, and *administration* of private employee benefit plans' ", the regulation of which, Appellee acknowledges, constituted a major purpose behind the enactment of ERISA. Appellee's Brief at 4.

Appellee's second argument in support of her contention that this appeal lacks a substantial federal question is that the ERISA Improvement Act of 1979, S.209, 96th Cong., 1st Sess. (1979), somehow evidences a Congressional intent "to eliminate even the appearance of preemption". Appellee's Brief at 5 n.1. It is respectfully submitted that this proposed legislation does nothing of the sort.

In the first place, an unpassed Senate bill cannot reasonably be cited as evidence of what Congress' intent was five years earlier when it enacted the existing statutory scheme upon which this appeal is based. Secondly, even if the bill could be so used, it would support the contrary proposition that Congress intended to preclude state courts from issuing orders, such as that in dispute here.

As Appellee noted, Section 155 of the bill provides, in pertinent part:

> "Section 514 of such Act is amended by—
>
> . . . .
>
> . . . .
>
> "(3) adding a new subsection (b)(6) to read as follows:
>
> "(6) Subsection (a) shall not apply respecting any judgment, decree, or order pursuant to a State domestic relations law (whether of the common law or community property type), if such judgment, decree or order is described in section 206(d)(3)."

The proposed Section 206(d)(3), which is contained in Section 128 of the bill, provides, in turn:

> "Section 206(d) of such Act is amended by adding at the end thereof the following new paragraph:
>
> "(3) Paragraph (1) shall not apply in the case of a judgment, decree or order (including an approval of a property settlement agreement), pursuant to a State domestic relations law (whether of the common law or community property type), which—
>
> "'(A) affects the marital property rights of any person in any benefit payable under a pension plan or the legal obligation of any person to provide child support or make alimony payments, and
>
> "'(B) *does not require* a pension plan *to alter* the effective *date, timing,* form, duration, *or amount of any benefit payments* under the plan *or to honor any election which is not provided for under the plan or which is made by a person other than a participant or beneficiary.*' " (Emphasis added).

The *order* involved in the instant case would not be one excluded from the application of Section 514 (a) of ERISA by Section 155 of the bill, because it fails to fulfill the requirements of the proposed Section 206(d)(3)(B). This is attributable to the fact

that it requires the Appellant "to alter" the timing, form and amount of benefit payments otherwise due Appellee's former spouse, and requires the Appellant to honor an election "not provided for under the plan . . . made by a person other than a participant or beneficiary." Insofar as the order is not one Congress would make exempt from Section 514(a), it must be concluded that Congress would intend that it, and like orders, be invalidated.

Neither of Appellee's arguments discussed above really support the proposition that a substantial federal question is lacking in this appeal. Rather, they go to the merits of the case-in-chief. As such, they should be given no weight at all on the issue of whether this appeal should be dismissed.

In its brief on appeal, Appellant pointed out that various conflicting decisions of lower federal and state courts have generated a great deal of uncertainty in regard to the preemptive effect of ERISA vis-à-vis California's community property laws. This uncertainty has, in turn, caused numerous employee benefit trust funds to incur high litigation costs in an attempt to protect the interests of their participants and to obtain some final resolution of the matter. These high litigation expenses promise to continue until such time as a definitive ruling is rendered by this Court. Appellant, therefore, respectfully requests the Court to reject the contention that this appeal lacks a substantial federal question.

2. The Judgment of the Court of Appeal of the State of California Does Not Rest on an Adequate and Independent State Ground.

The contention that the judgment of Court of Appeal of the State of California was based on an adequate and independent state ground (*i.e.*, California community property law) is indeed ingenious. If accepted, it would mean that this Court is without jurisdiction to review any state court decision rejecting a challenge to a state law on the ground that it is preempted by a federal statute. For the argument could always be made that the decision was based on the challenged state law.

An analysis of the rationale behind the adequate and independent state ground doctrine reveals that it is wholly inapplicable here. In the famous case of *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945), Justice Jackson stated:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights.*" (Emphasis added).

The parameters of this rationale are in need of exposition. If a state court ruled that an order or regulation is repugnant to both state and federal law, the Supreme

Court would be without jurisdiction to review the decision. For even if the Court disagreed with the state court interpretation of federal law, the decision could not be overturned, as the Supreme Court cannot reverse a state court interpretation of a state law (unless that law itself violates some federal statute or regulation). *See, e.g., Serrano v. Priest,* 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P. 2d 1241 (1971). It stands to reason, however, that if a state court held an order or regulation *to be valid* under both state and federal law, the Supreme Court could review the decision. For if the order or regulation were found to violate federal law, the state court decision would have to be reversed regardless of the interpretation given the state law.

In holding the order of the trial court in the instant case to be valid under, and authorized by, California community property law, the court of appeal expressly held that ERISA "does not preempt California law as is applied here in matrimonial matters . . ." Appellant's Brief on Appeal, Appendix at 11-12. Appellee's contention that the judgment below was based on an adequate and independent state ground must, accordingly, be rejected, as a finding by this Court that ERISA does preempt California community property law, would require a reversal of the decision.

Conclusion.

Appellee has failed to substantiate the grounds upon which her motion to dismiss the appeal herein is based.

In support of her contention that the appeal lacks a substantial federal question, Appellee argues that the intent of ERISA "does not conflict with the state scheme of division of community property", and that the ERISA

Improvement Act of 1979 somehow substantiates this view. An examination of these arguments reveals, however, that Appellee's position herein is erroneous and misleading. More significantly, insofar as they go only to the merits of the controversy, they do nothing to advance the proposition that a substantial federal question is lacking.

Contrary to what Appellee might assert, the uncertainty created by conflicting lower court decisions makes it imperative for this Court to resolve the issue of the preemptive effect of ERISA in regard to California's community property laws.

Appellee's contention that this Court is without jurisdiction to consider this appeal because the judgment of the court of appeal for the State of California was based on an adequate and independent state ground is misplaced. The United States Supreme Court clearly has the authority to review a state court ruling that an order, such as the one involved here, does not violate a federal statute.

Appellant, therefore, respectfully requests the Court to deny Appellee's Motion to Dismiss, and to permit this appeal to be argued on its merits.

Dated: July 12, 1979.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

RETIREMENT FUND TRUST OF THE PLUMBING, HEATING AND PIPING INDUSTRY OF SOUTHERN CALIFORNIA, APPELLANT

v.

EDITH J. JOHNS

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

SOUTHERN CALIFORNIA IBEW-NECA PENSION PLAN, ET AL., PETITIONERS

v.

FRANCES ELIZABETH JOHNSTON AND CLIFFORD ALBERT JOHNSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of October 1, 1979.

QUESTION PRESENTED

The United States will discuss the following question:

Whether Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144, preempts state community property law so as to bar enforcement of a state court divorce decree directing a pension plan to pay a share of benefits to the ex-spouse of a participant in the plan.

STATEMENT

1. *No. 78-1422.* Appellee Edith J. Johns and Leroy A. Johns were married in Yuma, Arizona, on June 15, 1945. Sometime thereafter, they moved to California where Leroy Johns became employed in the plumbing, heating and piping industry. As a result of his employment, Johns became a participant in appellant Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California. The trust agreement that appellant established provides for the payment of specified benefits to the retired employee, his family or dependents if certain conditions are met. The trust agreement also contains a "spendthrift" provision that prohibits the assignment or alienation of benefits until they are paid to the retired employee (J.S. 5-6).

In 1976, appellee commenced a proceeding in the Superior Court for San Diego County to dissolve her marriage to Johns. Appellee joined appellant Retirement Fund Trust in that proceeding because she claimed a community property interest in the benefits paid by appellant to her husband. After a hearing upon stipulated facts, the Superior Court ordered appellant to pay appellee her one-half community property interest in Johns' periodic retirement benefits (J.S. 6-7).

The Court of Appeal affirmed (J.S. App. 11-12). It found "no impediment to the fund sending a monthly check to the half-owner Edith. In this day of computer technology, the burden on the fund to make out two checks and envelopes, rather than one, is insignificant" (*id.* at 11). In so ruling, the court held that "the Employee Retirement Income Security Act of Congress (ERISA) does not preempt California law as applied here in matrimonial matters * * *. The spendthrift features of ERISA are not applicable because Edith is an owner, not a creditor" (*id.* at 11-12).

2. *No. 78-1445.* On January 17, 1974, respondent Clifford Albert Johnston filed a petition in the Superior Court for Los Angeles County for dissolution of his marriage to respondent Frances Elizabeth Johnston. In the divorce proceeding, Mrs. Johnston asserted a community property interest in certain funds paid to her husband by petitioners Southern California IBEW-NECA Pension Plan, the National Electrical Benefit Fund, and the International Brotherhood of Electrical Workers Pension Benefit Fund (Pet. 4; Pet. App. 2a). After petitioners failed to obtain a

federal district court injunction against the issuance of any state court order inconsistent with ERISA, the Superior Court ordered petitioners to pay Mrs. Johnston 50% of the pension benefits due Mr. Johnston (Pet. 5; Pet. App. 3a).

The Court of Appeal affirmed (Pet. App. 1a-18a). It held that the pension benefits were community property under California law and that Section 514 of ERISA, 29 U.S.C. 1144, does not preempt California community property law or bar the state court from ordering the partial distribution to Mrs. Johnston of the pension benefits otherwise due her former husband (Pet. App. 7a). The court stated (*id.* at 13a-14a): "We conclude that the preemption clause of ERISA does not effect [*sic*] the operation of California community property law; that ERISA does not interfere with the power of California courts to divide pension benefits between a husband and wife and to order direct payments of those benefits to a nonemployee spouse; [and] that California community property law does not relate to and is thus not included in federal regulation of any pension benefit plan."

The Court of Appeal also rejected petitioners' contention that the Superior Court's order requiring payment of pension benefits directly to Mrs. Johnston was an assignment or alienation of those benefits prohibited by Section 206(d)(1) of ERISA, 29 U.S.C. 1056(d)(1). In the court's view, the Superior Court's order did not require an assignment or alienation but merely affirmed Mrs. Johnston's existing property interest in the benefits (Pet. App. 14a-15a).

DISCUSSION

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, establishes uniform standards with respect to the administration and operation of private pension plans. In enacting this legislation, Congress sought to reduce the burden of meeting the requirements of the new federal law by insulating pension plans from possibly inconsistent or duplicative laws of the individual states. It therefore provided in Section 514(a) of ERISA, 29 U.S.C. 1144(a), that "the provisions of this title * * * shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA]."

The legislative history demonstrates that Congress consciously chose a broad preemption principle. In its initial formulation, the preemption provision encompassed only those laws which related to subjects covered by the Act. See, *e.g.*, H.R. 2, 93d Cong., 2d Sess. § 699 (1974). However, in conference, the preemption provision was broadened to the present version encompassing *all* state laws relating to employee benefit plans subject to the Act. As one of the managers of the bill explained on the House floor, Congress intended to apply "this principle [of preemption of state law] in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof * * * which would affect any employee benefit

plan [subject to ERISA]" (120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)).

In light of this clear expression of legislative intent, the federal courts that have considered the scope of Section 514 have held in a variety of contexts that ERISA preempts state law. In reaching this result, the courts have adhered to Senator Williams' observation at the time of ERISA's enactment that the preemption rule should "apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which may have the force or effect of law" (120 Cong. Rec. 29933 (1974)). See, *e.g.*, *Azzaro* v. *Harnett*, 414 F. Supp. 473, 474 (S.D.N.Y. 1976), aff'd, 553 F.2d 93 (2d Cir.), cert. denied, 434 U.S. 824 (1977) (state without jurisdiction to inquire into the status of a plan participant); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978) (ERISA preempts California statute regulating certain welfare plans); *Standard Oil Co.* v. *Agsalud*,. 442 F. Supp. 695 (N.D. Cal. 1977), appeal pending, No. 78-1095 (9th Cir.) (ERISA preempts Hawaii statute requiring pre-paid health insurance coverage of state workers). See also *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978); *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382, 385-387 (D. Kan. 1977).

In both of the instant cases, the decisions below upheld the community property claims of ex-spouses of participants in pension plans covered by ERISA to

a share of the benefits covered by such plans. In so ruling, two districts of the California Court of Appeal rejected the pension plans' argument that Section 514 of ERISA preempts California community property law. In No. 78-1422, the Fourth Appellate District concluded that ERISA does not bar a state court from requiring the pension plan to write two monthly checks instead of one (J.S. App. 11). In No. 78-1445, the Second Appellate District followed the analysis in *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), appeal pending, No. 78-2313 (9th Cir.). There, the court concluded that the California community property laws "affect employee benefit plans but * * * do not relate to them within the meaning of § 514(a)" (450 F. Supp. at 932).

2. While we disagree with the rationale of the decisions below, we believe that the judgments in favor of respondents are correct and that accordingly there is no need for review by this Court.

a. The courts below attempted to resolve the issue by holding that the preemption principle of Section 514 of ERISA has no application to community property law because "[t]he laws relating to marital dissolution are uniquely local in nature" (78-1445 Pet. App. 11a). As the Court of Appeal for the Second Appellate District saw the matter, Section 514 was "intended to affect only laws *relating to* employee benefit plans and not to preempt any state law with only a tangential relationship to ERISA" (*id.* at 13a; emphasis in original).

We submit that this analysis is at odds with the statutory language and legislative history of ERISA, which shows that, in enacting Section 514, Congress intended to "effect the broadest possible preemption of state law." *Francis* v. *United Technologies Corp.*, 458 F. Supp. 84, 86 (N.D. Cal. 1978). Preemption cannot turn upon whether the state law is "uniquely local" or "tangential" in its relationship to the pension plan, because such determinations are inherently subjective. More important, they are not the criteria Congress chose to employ in Section 514. Congress provided that *all* state laws affecting private pensions are preempted by ERISA, and it is thus not open to the courts to pick and choose candidates for preemption on the basis of characteristics deemed to be uniquely a matter of state concern or insufficiently related to the federal scheme. Accordingly, the California state law, by requiring the pension plans to pay benefits to persons who are not "participants" in the plans, necessarily "relate[s] to [the] employee benefit plan[s]" within the meaning of Section 514.

b. Although the courts below erred in concluding that Section 514 does not preempt state community property law, we believe that their judgments are correct on the basis of an implied exception to the anti-assignment provisions of ERISA. In the prefatory Findings and Declarations of Policy of ERISA, Congress stated its intention that the Act be interpreted in accordance with the paramount goal of providing protection for "employees and their beneficiaries." Section 2(a), 29 U.S.C. 1001(a). The

anti-assignment provisions of ERISA—Section 206 (d)(1), 29 U.S.C. 1056(d)(1), and Section 1021(c), 26 U.S.C. 401(a)(13)—are an integral part of the congressional effort to protect these classes of persons.

Thus, the House Report states that the anti-assignment provisions are intended to "ensure that the employee's accrued benefits are actually available for retirement purposes." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 68 (1974). Consistent with this purpose, these provisions not only forbid an employee from improvidently bargaining away his retirement support through voluntary assignment or alienation, but also prohibit attachment of the pension by creditors. The Conference Report explicitly states that the terms "assignment" and "alienation" include involuntary alienations, such as those resulting from garnishment. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 280 (1974).

While the legislative history of ERISA shows that Congress sought to protect employees' pension benefits against the claims of general creditors, it is silent as to the status of claims by spouses of participants. But many federal statutes include anti-assignment provisions similar to that of ERISA,[1] and the courts have consistently held that these comparable provisions do not bar enforcement of family support decrees in common law states. See *Schlaefer* v. *Schlaefer*, 112 F.2d 177 (D.C. Cir. 1940); *In re Flanagan*,

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[1] See 38 U.S.C. 3101 (Veterans Benefits); 5 U.S.C. 8346 (Civil Service Annuities); 45 U.S.C. 231m (Railroad Retirement Benefits); and 42 U.S.C. 407 (Social Security Benefits).

31 F. Supp. 402 (D. D.C. 1940). The Second Circuit has likewise recently held that an exception to ERISA's anti-assignment provisions should be implied to allow the enforcement of family support orders attaching the pension benefits of a participant in pay status. See *American Telephone and Telegraph Co.* v. *Merry*, 592 F.2d 118 (1979). Accord, *Cody* v. *Riecker*, 454 F. Supp. 22 (E.D. N.Y. 1978), aff'd, 594 F.2d 314 (2d Cir. 1979); *Cartledge* v. *Miller*, 457 F. Supp. 1146 (S.D. N.Y. 1978).

To be sure, these decisions do not address the question presented in the instant cases as to the status of decrees based on community property claims. We believe, however, that the considerations that prompted the Second Circuit to find an implied exception in the anti-assignment provisions of ERISA to uphold family support decrees offer a useful analogy in determining the validity of the decrees whose enforceability is at issue in these cases. The purpose of the anti-assignment provisions of ERISA is to protect "employees and their beneficiaries." [2] While not a "beneficiary" under the statute (Section 3(8), 29 U.S.C. 1002(8)), the non-employe ex-spouse

[2] Appellant's argument (J.S. 24-27) that the National Labor Relations Act bars state courts from dividing a pension covered by ERISA begs the question. The particular provision upon which appellant relies states that employers may contribute to pension trusts named "for the sole and exclusive benefit of the employees of such employer, and their families and dependents * * *" (29 U.S.C. 186(c)(5)). Here, the implied exception to the anti-alienation provision assumes that there is a family obligation owed by the plan participant to the ex-spouse.

in a community property state is as deserving of such protection as an ex-spouse in a common law jurisdiction. Given the congressional intent to establish uniform standards of pension administration to protect employees and their families, we believe that respondents' claims in these particular factual settings can be upheld on the basis of an implied exception to the anti-assignment provisions without trenching upon the broad preemption principle inherent in Section 514. As the district court observed in *Stone* v. *Stone*, *supra*, 450 F. Supp. at 926, "[i]t would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce."

c. *Wissner* v. *Wissner*, 338 U.S. 655 (1950), and *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), upon which appellant (J.S. 14-15) and petitioners (Pet. 9, 12) rely, are not to the contrary. In *Wissner*, an army officer named his mother and father as beneficiaries under his National Service Life Insurance Policy, but made no provision for his wife. The National Service Life Insurance Act of 1940 provided that the insured " 'shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries * * *.' " 338 U.S. at 658. Despite this provision, a California state court held that the proceeds of the insurance policy, which had been purchased with community funds, were com-

munity property and ordered that one-half of the proceeds be paid to the widow by the named beneficiaries. *Ibid.*

This Court reversed. Citing the provision of the Act that granted the insured the right to designate the beneficiary of the policy, the Court concluded that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other" (338 U.S. at 658). As the Court observed, "[w]hether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress" (*id.* at 659). See also *Free* v. *Bland*, 369 U.S. 663 (1962). By contrast, ERISA has no provision comparable to the choice-preserving provision that the Court in *Wissner* found to be incompatible with the enforcement of a community property interest in the life insurance policy. *Wissner* is therefore distinguishable.

Hisquierdo v. *Hisquierdo, supra*, is likewise inapposite. There, the Court held that the anti-assignment provisions of the Railroad Retirement Act, 45 U.S.C. 231m, prohibited the California courts from awarding to non-employee spouses, pursuant to state community property law, a share in the pension benefits of an employee-participant in the federal railroad retirement system. As in *Wissner*, the decision turned on the specific provisions of the pertinent federal statute. The Court observed that Congress explicitly provided in the Railroad Retirement Act that

a spouse's benefits terminated upon divorce (439 U.S. at 585) and made a deliberate decision to allow garnishment of benefits pursuant to common law support obligations but not pursuant to community property law (*id.* at 587). ERISA has no such comparable provisions. Indeed, the Court remarked in *Hisquierdo* that "[d]ifferent considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates" (439 U.S. at 590 n.24). The Court therefore added that its holding in *Hisquierdo* "intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics" (*ibid.*).

3. Because the judgments of the courts below are correct, we do not believe that it is necessary for this Court to grant review in these cases simply to substitute the proper rationale. While there is an increasing amount of litigation on the issue whether a non-employee spouse can assert a community property claim to a share of benefits of a pension covered by ERISA,[3] the California state court decisions thus far favor such claims. See also *In re Marriage of Lionberger*, 158 Cal. Rptr. 535 (Ct. App. 1979).

Finally, while there is conflict at present among the district courts in California concerning the issue

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[3] An appeal seeking review of three other California state court decisions presenting the same question is now pending in this Court. See *Carpenters Pension Trust Fund for Northern California* v. *Campa, Durkin and Bryant*, No. 78-1881.

presented in these cases,[4] this conflict undoubtedly will be resolved by the Ninth Circuit's decision in *Stone* v. *Stone, supra.*[5] The court of appeals in that case may well uphold the non-employee spouse's claim on the basis of an implied exception to the anti-assignment provisions of ERISA.[6] Plenary consideration by this Court of the questions presented would therefore be premature at this time.

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[4] Compare *Stone* v. *Stone, supra,* and *Carpenters Pension Trust* v. *Kronschnabel,* 460 F. Supp. 978 (C.D. Cal. 1978), appeal pending, No. 79-3031 (9th Cir.), with *Francis* v. *United Technologies Corp., supra.*

[5] We are advised by the Clerk of the Ninth Circuit that oral argument in *Stone* should be scheduled no later than June 1980.

[6] The Secretary of Labor has filed a brief amicus curiae in *Stone,* urging affirmance on the basis of an implied exception to the anti-assignment provisions of ERISA. Respondents in No. 78-1445 contend (Br. in Opp. 5 n.2) that the government's position is the product of "unusual reasoning." We believe that the construction of ERISA offered above is faithful to the legislative history concerning preemption yet fully accommodates substantial state interests.

CONCLUSION

The appeal in No. 78-1422 should be dismissed for want of a substantial federal question. The petition for a writ of certiorari in No. 78-1445 should be denied.

Respectfully submitted.

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